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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Implementation of the)
Cable Television Consumer)
Protection and Competition)
Act of 1992:)
)
Rate Regulation)
)

MM Docket No. 92-266

Reply Comments of

NEW ENGLAND CABLE TELEVISION ASSOCIATION, INC.

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NEW ENGLAND CABLE TELEVISION ASSOCIATION, INC.

The New England Cable Television Association, Inc.
("NECTA"), the regional trade association representing cable
television operators in Connecticut, Maine, Massachusetts, New
Hampshire, Rhode Island, and Vermont, submits these reply
comments in response to the Commission's Notice of Proposed
Rulemaking in this docket ("the Notice").^{1/}

**I. COMMENTS FAIL TO DEMONSTRATE ANY CLEAR STATUTORY
LANGUAGE DISPLACING THE TRADITIONAL POWER OF THE STATES
TO DEFINE LOCAL FRANCHISING AUTHORITY.**

NECTA's initial comments stressed that the Cable Television
Consumer Protection and Competition Act of 1992 ("the 1992 Act")
does not -- and cannot -- "upset the traditional relationship
between state and local governments, under which a local
government is a political subdivision of the state and derives
its authority from the state," reflected in Title VI of the

^{1/}Implementation of the Cable Television Consumer Protection
and Competition Act of 1992, Rate Regulation, Notice of Proposed
Rulemaking, MM Docket No. 92-266, FCC 92-544 (released December
24, 1992).

Communications Act.^{2/} NECTA thus urged the Commission to allow flexibility and deference for diverse state regulatory schemes.

NECTA submits these reply comments first to highlight the similarity between its initial comments and those of The Massachusetts Community Antenna Television Commission ("the Massachusetts Commission") on the role of the states on the regulation of cable television.^{3/} The comments of the Massachusetts Commission parallel NECTA's in interpreting the 1992 Act to refer to state law to determine the "legal authority" of franchising authorities to regulate rates and in asking the FCC to recognize the authority of states and state bodies to set regulatory policy within the boundaries of the Act and the Commission's regulations.

The Massachusetts Commission's comments on these issues contrast with those of other New England regulators. The Mayors of Somerville, Massachusetts and New Bedford, Massachusetts each submit identical comments^{4/} asserting their "belief" that the FCC has authority to certify municipalities to regulate rates even where state law denies them legal authority to do so.^{5/} But while they acknowledge that the 1992 Act "permits" rate

^{2/} Cable Franchise Policy and Communications Act of 1984, Report of the Committee on Energy & Commerce, H. Rep. No. 98-934, 98th Cong. 2d Sess., at 94 (Aug. 1, 1984); see 47 U.S.C. § 556(b).

^{3/}Comments of The Massachusetts Community Antenna Television Commission at 1-6.

^{4/}Except for changes in local references.

^{5/} Comments of The Mayor of The City of Somerville at 4; Comments of The Mayor of The City of New Bedford at 4.

regulation, the mayors fail to point out how it is "unmistakably clear in the language of the statute" that such an unprecedented alteration in the constitutional balance between the States and federal government is intended.^{6/} For the reasons demonstrated in our main comments and those of the Massachusetts Commission, the Act permits local franchising authorities to regulate rates only where state or local law establishes their authority to do so.

II. COMMENTS DEMONSTRATE THAT COST OF SERVICE REGULATION IS IMPRACTICAL AND INAPPROPRIATE.

The comments of the Massachusetts Commission are important to this proceeding because they represent the experience of an agency that has already done what the Commission is now called on to do -- supervise the administration of rate regulation by franchising authorities. In this light, the Massachusetts Commission's endorsement of benchmarks based on its own experience detailed in footnote 1 of its comments is uniquely significant.

The Massachusetts Commission recounts how Massachusetts initially attempted to use cost of service regulation, but the experience proved "slow and arduous for local communities, the operators and the Massachusetts Commission." This hands-on experience demonstrates that cost of service regulation does not meet the requirement of the 1992 Act that Commission regulations "shall seek to reduce the administrative burdens on subscribers,

^{6/}Gregory v. Ashcroft, __ U.S. __, 115 L.Ed.2d 410, 423, quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985).

cable operators, franchising authorities, and the Commission."
Section 623 (b) (2) (A).

The Attorney General of Connecticut premises support for cost of service regulation on the allegation that the per channel cost of basic service in Connecticut has risen 54.1 percent since the effective date of the 1984 Cable Act.^{7/} This submission appears to be based on an April, 1992 "review" of cable rates with which NECTA is familiar. The data in that study is riddled with serious errors.^{8/} NECTA is confident that the Commission's survey of rates in conjunction with this proceeding, whatever limits it may have, will furnish far more accurate information than such misleading submissions.

We respectfully submit, therefore, that many of the parties that urge cost of service regulation^{9/} do so out of regulatory

^{7/}Comments of The Attorney General, State of Connecticut at 1-2.

^{8/}For example, for Cablevision of Connecticut (a Cablevision Systems Corporation subsidiary), the Attorney General's study correctly lists the basic cable rate in 1986 as \$6.45; but it lists the number of channels as 44. In fact, this rate was for a 27-channel broadcast basic service with very low penetration; Cablevision of Connecticut also offered an "expanded basic" service in 1986, but this service had 35 channels, not 44. Likewise, its affiliate Cablevision of Southern Connecticut is listed in the Attorney General's study as offering 27 channels on basic when in fact it offered only 22 channels on broadcast basic. These errors are material: Cablevision of Connecticut and Cablevision of Southern Connecticut comprise 20 percent of the cable subscribers in Connecticut.

Correcting such errors, NECTA's own study of cable rates on file with the Connecticut Department of Public Utility Control as of April, 1991 found that, on average, Connecticut basic cable subscribers received 24 channels at a per channel cost of 46 cents in 1984; as of 1991, they received 38 channels at a **reduced** cost of 44 cents per channel.

^{9/}E.g., Comments of Mayor of Somerville at 4; Comments of Mayor of New Bedford at 4.

reflex and without an appreciation of the administrative burdens involved. It would take a roster of accountants and industry specialists on the municipal payroll to meet the Act's requirement a franchising authority have "the personnel to administer" such a regulatory program. See Section 623 (a)(3)(B). More thoughtful regulators, therefore, while differing in how benchmarks should be made up, join the Massachusetts Commission in endorsing the Commission's benchmark proposal.^{10/}

NYNEX, on the other hand, urges cost of service regulation **with** an appreciation of the administrative burdens. Its comments are part of the continuing effort by local exchange telephone companies to persuade the Commission adopt a regulatory framework modeled directly on the common carrier model applicable to local telephone monopolies -- even as they themselves urge that this model should no longer apply.^{11/} For the reasons amply demonstrated by other parties,^{12/} this model does not apply in the marketplace of cable television. In contrast to telephone companies that have provided stable service in broad regions for

^{10/}E.g., Comments of the Attorneys General of Pennsylvania, Massachusetts, New York, Ohio, and Texas at 2-5; Comments of the National Association of Telecommunications Officers and Advisers, National League of Cities, United States Conference of Mayors, and the National Association of Counties at 44-46.

^{11/}In Vermont, for example, NYNEX's New England Telephone subsidiary successfully pursued a "social contract" with the Vermont Public Service Board under which all but basic telephone service in Vermont is being deregulated. See Vt. Stat. Ann. § 226a; Investigation of The Proposed Modified "Vermont Telecommunications Agreement," Order (Vermont P.S.B., Dec. 30, 1988).

^{12/}See, e.g., Comments of Continental Cablevision, Inc. at 23-26 and Appendices B & C.

over a century, cable operators provide service under local franchises with limited terms in a marketplace whose fluid dynamics are evident in the change from the 1984 to the 1992 Cable Acts. The Commission has already rejected the wooden application of a telephone model to carry out the 1992 Act and looked at the specific attributes of cable television in the cable home wiring proceeding.^{13/}

III. THE 30-DAY NOTICE REQUIREMENT IN SECTION 623 (b) (6) ESTABLISHES A TIMELINE FOR REGULATORY ACTION.

The 1992 Act recognizes that a "reasonable profit" for cable service is one of the criteria the Commission's regulations must take into account. Section 623 (b) (2) (viii). This criterion cannot be met if the Commission's regulations enable franchising authorities to delay reasonable increases arbitrarily and unreasonably.

Section 623 (b) (6) addresses this risk; its provision that a cable operator must provide a franchising authority with 30 days' advance notice of any proposed increase in the price of basic service defines the time within which a franchising authority may act. Once 30 days have passed, a cable operator may begin to implement a basic rate increase.

The Act does not indicate any longer period for review. Thus, we believe that those comments urging that rates be permitted to go into effect after 30 days subject to refunds if

^{13/}Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, Report & Order, MM Docket No. 92-260 (released Feb. 2, 1993).

they exceed benchmarks correctly interpret the Act.^{14/} In the alternative, the process should be comparable treatment of utility tariffs, which may go into effect unless their effective dates are suspended. Thus, a franchising authority with authority to regulate would have to act within the prescribed 30 days to postpone a proposed increase. And as with the suspension of utility tariffs, the franchising authority would have to complete its action within a finite period.

The Commission has proposed that this period be 120 days -- an inordinately long time for individual rate requests when it is considered that this unusually broad and detailed rulemaking proceeding to get the ground rules for such requests will take less time. The Massachusetts Commission, although it supports this proposal, goes on to contend that this 120 days should run from the time that a cable operator submits all the information requested by the franchising authority.^{15/} This defeats the purpose of the Commission's rules as defined by Section 623 and provides a subterfuge to delay reasonable rate increases indefinitely.

Section 623 (g) charges the Commission with defining what financial information is necessary to administer and enforce Section 623. Thus, the system of rate regulation the Commission adopts in this proceeding should enable cable operators, franchising authorities, and the Commission to meet its

^{14/}E.g., Comments of The National Cable Television Association at 72-74.

^{15/}Comments of Massachusetts Commission at 10.

requirements on the basis of the information specified by the Commission rather than an open-ended, case-by-case inquiry.

Setting the time period for franchising authority action based on the submission of information by the cable operator permits franchising authorities to keep turning the clock back by asking for more information. That is what happens in Massachusetts in the review of cable franchise transfers. State law requires that approvals of transfers or transfers of control take place within 60 days of an application for approval.^{16/} Massachusetts Cable Commission policy in turn interprets this to require that franchising authorities must conduct a hearing on transfer application within 60 days and then have another 60 days to act^{17/} -- amounting to the same 120 days the Massachusetts Commission urges as a reasonable time to act on a rate request. Massachusetts Commission policy also states that this 120 days does not begin to run until all information required by the franchising authority is complete,^{18/} the same condition the Massachusetts Commission urges be included in FCC rules.

The result of this policy in Massachusetts has been that franchising authorities make repeated demands for further

^{16/}Mass. Gen. Laws. c. 166A § 14.

^{17/}Teleprompter of Worcester, Inc. v. Board of Selectmen of Auburn, Massachusetts CATV Commission No. A-37 (May 17, 1983).

^{18/} Commission Clarification of Certain Transfer Application Issues at 3-4, Mass. CATV Commission Bulletin No. 87-1 (Nov. 25, 1987).

information and rarely take timely action.^{19/} The Commission should not structure its rules so as to permit such manipulation.

IV. ITEMIZATION OF COSTS IMPOSED BY GOVERNMENTAL AUTHORITIES MUST INCLUDE ITEMS SUCH AS FACILITIES DEDICATED TO GOVERNMENT USE AND COPYRIGHT FEES.

The Mayors of Somerville and New Bedford contend that the authorization for cable operators to itemize certain governmentally-imposed costs as separate line items on subscriber bills should not include costs such as institutional networks (I-Nets) or drops to public buildings.^{20/} Recognizing this issue, the Massachusetts Commission asks the FCC to provide guidelines in its regulations.^{21/}

The mayors' proposal is inconsistent with the 1992 Act and Commission policy. Section 623 (b) explicitly includes "other services requires by the franchise" alongside PEG access channels among the costs the costs to be identified as "costs of franchise requirements." Section 623 (b)((3), (4). Commission policy has long recognized that, like PEG access channels, facilities such as free wiring of public buildings, governmental studios, and I-Nets are furnished as consideration for a cable franchise. FCC policy prior to the 1984 Cable Act -- applied in a decision

^{19/}A-R Cable Systems, Inc. filed 17 applications for approvals of a transfer of control in connection with its refinancing and partnership with Warburg, Pincus Investors L.P. on May 27, 1993. Few of these applications were acted within the 60 (or 120) days ostensibly required by state law, and two remain pending still 260 days later.

^{20/}Comment of The Mayor of The City of Somerville at 8 (filed Jan. 27, 1993); Comments of The Mayor of the City of New Bedford at 8 (filed Jan. 27, 1993).

^{21/}Comments of Massachusetts Commission at 24-27.

involving the City of New Bedford among others -- included such facilities toward the Commission's three-to-five percent limit on franchise fees.^{22/} The 1984 Act substantially codified the FCC's franchise fee limit.^{23/} Continued itemization of such facilities pursuant to Section 622(c) is therefore consistent with the Act and with existing Commission policy.

The Massachusetts Commission also suggests that the FCC should preclude itemization of copyright fees on the basis that the Register of Copyrights and the Copyright Royalty Tribunal "are merely administrative clearinghouses for these payments" and are not the body "which imposes the requirement that an operator pay copyright fees."^{24/} This begs the question, because the Act permits itemization of any fee imposed "by **any** governmental authority," regardless of what agency collects or distributes this fee. Section 622 (c) (3) (emphasis added). This provision encompasses the federal government, which imposes the copyright royalty fee. The latter fee is subject to this provision no less than would be a sales or use tax on cable service imposed by

^{22/}See City of Miami, 56 P&F 2d 458 (1984); International Telemeter of New Bedford, 47 F.C.C.2d 469 (1974); Clarification of Cable Television Rules, 46 F.C.C.2d 175, 206 (1974).

^{23/}See Schloss v. City of Indianapolis, 528 N.E.2d 1143 (Ind. Ct. App., 1988) aff'd No. 41504-9005-CV-351 (Ind. May 17, 1990).

^{24/}Comments of Massachusetts Commission at 26.

federal or state law, but collected by the Internal Revenue Service or a state taxation agency.^{25/}

The Massachusetts Commission also urges the Commission to adopt additional regulations restricting the way that franchise fees and other charges and requirement can be shown on subscriber bills by requiring advance notice to the franchising authority and a right on the part of the franchising to audit documentation of costs itemized.^{26/} The effect would be to inject franchising authorities into an additional area of regulation, where they regulate not only the basic rate, but this component of the total rate. But Sections 623 (b) (2) and (4) charge the Commission -- not franchising authorities -- with identifying how costs of franchise requirements should be identified. As the Mayors of


^{25/}The Massachusetts Commission also suggests that legislative history indicating that itemization of costs should be part of the total cable bill and not billed separately, see House Report at 86, requires franchise fees be included in the gross revenue from which franchise fees are derived. Comments of Massachusetts Commission at 28 n. 11. The example it gives is where cable service costs \$20.00 and cable operator lists \$1.00 as the franchise fee due. The Massachusetts Commission says that in this situation, the gross revenue received from the subscriber is \$21.00 and that the franchise fee therefore should be \$21.05. But, by this argument, the gross revenue would become \$21.05 and the franchise fee would have to increase to \$21.06. The result is completely circular. The franchise fee must be calculated on a finite and definite amount, and it therefore reasonable to itemize and pay the franchise fee based on gross revenues from subscribers without including franchise fees in gross revenue. Otherwise franchise fees result in a tax on a tax.

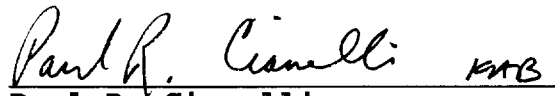
The House Report means simply that itemized costs should be added to a single total representing a subscriber's cable bill and not listed apart from the total bill for cable service, consistent with the practice depicted by the Massachusetts Commission and by cable operators. See, e.g., Comments of Continental Cablevision at 79.

^{26/}Comments of Massachusetts Commission at 27-28.

New Bedford and Somerville suggest,^{27/} review of compliance with these regulations in the itemization of franchise costs and fees properly belongs with the Commission.

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February 11, 1993
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^{27/}Comments of Mayor of Somerville at 9, Comments of Mayor of New Bedford at 9.

CERTIFICATE OF SERVICE

I, Keith A. Barritt, hereby certify that copies of the foregoing Reply Comments of New England Cable Television Association, Inc., were sent on February 11, 1993 via first class mail, postage pre-paid, to the following:

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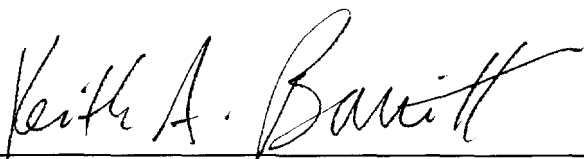
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A handwritten signature in cursive script, reading "Keith A. Barritt". The signature is written in dark ink and is positioned above a horizontal line.

Keith A. Barritt